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19 UNITED STATES BANKRUPTCY COURT  
20 NORTHERN DISTRICT OF CALIFORNIA  
21 SAN FRANCISCO DIVISION

22 In re ) Case No. 11-31376 DM  
23 ) Chapter 11  
24 ) Hon. Dennis Montali  
25 HOWREY LLP, )  
26 )  
27 Debtor. )

28 **CHAPTER 11 TRUSTEE'S MOTION**  
29 **FOR ENTRY OF ORDER**  
30 **APPROVING THE B&H BUNDLED**  
31 **SETTLEMENT**

32 TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE:

33 Allan B. Diamond, the chapter 11 trustee ("Trustee") of the estate of Howrey LLP  
34 ("Howrey" or "Debtor"), hereby submits this motion ("Motion") pursuant to Federal Rule of  
35 Bankruptcy Procedure 9019(a) for entry of an order approving the B&H Bundled Settlement  
36 between the Trustee, on the one hand, and Baker & Hostetler LLP ("B&H"), Robert G. Abrams,

Gregory L. Baker, Robert J. Brookhiser, Jr., John F. Bruce, Gregory J. Commins, Jr., Gilbert S. Keteltas, Joanne Lichtman, Christopher H. Marraro, Elizabeth B. McCallum, Terry L. Sullivan, Joanne E. Caruso-Zaccaro (the forgoing individuals being hereinafter collectively referred to as the “B&H Former Howrey Partners”) on the other, and represents as follows:

### **JURISDICTION**

1. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and (b). This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2).

### **BACKGROUND**

2. Baker & Hostetler LLP (“B&H”) was one of the successor firms who hired former Howrey partners. Specifically, B&H hired eleven former Howrey partners (collectively, the “B&H Former Howrey Partners”):

<b>Former Howrey Partner</b>	<b>Level</b>	<b>Howrey Office</b>
Robert G. Abrams	Level II	Washington, D.C.
Gregory L. Baker	Fixed	Washington D.C.
Robert J. Brookhiser	Level II	Washington, D.C.
John F. Bruce	Fixed	Washington, D.C.
Gregory J. Commins	Level II	Washington, D.C.
Gilbert S. Keteltas	Level II	Washington, D.C.
Joanne Lichtman	Level II	Los Angeles, CA
Christopher H. Mararro	Level II	Washington, D.C.
Elizabeth B. McCallum	Level II	Washington, D.C.
Terry L. Sullivan	Level II	Washington, D.C.
Joanne E. Caruso-Zaccaro	Level II	Los Angeles, CA

1           3. Many of the B&H Former Howrey Partners joined B&H at or near March 28, 2011,  
2 the date on which Howrey's Dissolution Committee executed a Case Transfer and Allocation of  
3 Hours Agreement (the "Transfer Agreement") with B&H. The Transfer Agreement specified,  
4 among other things, the terms on which B&H and Howrey would allocate recoveries in class  
5 action contingent fee cases known as the Milk Cases.  
6

7           4. Upon the Trustee's appointment, he was informed immediately of the significance of  
8 the Milk Cases to Howrey's estate (the "Estate"). Both the Trustee and his counsel began  
9 investigating all aspects of the Milk Cases, including: (a) the extent of Howrey's financial  
10 investment; (b) the circumstances surrounding the Transfer Agreement; (c) the language and  
11 potential differing interpretations of the Transfer Agreement itself; (d) the status of the Milk  
12 Cases, including an extensive review of publicly-filed documents and press materials; and (e)  
13 needed discovery from B&H and relevant third parties.  
14

15           5. The Trustee and his counsel also investigated claims against B&H unrelated to the  
16 Transfer Agreement, including: (a) the appropriate share of Howrey's interest in recoveries of  
17 the Online DVD (defined below) antitrust class actions; (b) hourly unfinished business taken  
18 from Howrey to B&H by the B&H Former Howrey Partners; (c) claims under Section 549 of the  
19 Bankruptcy Code; and (d) partner clawbacks against the B&H Former Howrey Partners related  
20 to distributions or return of capital received at a time when Howrey may have been insolvent.  
21

22           6. Through the Trustee's personal contacts and relationships at B&H, the Trustee and  
23 his counsel began a dialogue with the firm's general counsel, John D. Parker, who represents  
24 both B&H and the B&H Former Howrey Partners.  
25

26           7. After working through various procedural issues (such as the establishment of a joint  
escrow account to hold approximately \$2.2 million in attorneys' fees and expenses already  
recovered on a settlement with Dean Foods in NE Milk, as detailed below) and obtaining

1 substantial discovery from B&H and various third parties, the Trustee and his counsel then  
2 arranged and began face-to-face settlement discussions with B&H and certain of the B&H  
3 Former Howrey Partners.

4         8. The face-to-face settlement meetings began in October 2012 and continued through  
5 June 2013. There were three such meetings (one in Washington, D.C., and two in New York,  
6 New York) during this period. The Trustee personally attended each meeting along with his  
7 counsel. The Trustee invited Citibank's counsel and counsel for the Creditors' Committee to  
8 attend each meeting, which B&H agreed to upon the Trustee's request, and Citibank's counsel  
9 and the Creditors' Committee counsel did attend each meeting. John D. Parker, as counsel for  
10 B&H and the B&H Former Howrey Partners, and Robert G. Abrams and Gregory J. Commins,  
11 formerly two senior partners at Howrey, attended on behalf of B&H and the B&H Former  
12 Howrey Partners.  
13  
14

15         9. In addition to the face-to-face meetings, there were dozens upon dozens of telephone  
16 calls between the Trustee and/or his counsel, and John D. Parker.

17         10. After nearly two years of investigation and negotiation, the Trustee reached a bundled  
18 settlement with B&H and the B&H Former Howrey Partners (the "B&H Bundled Settlement") in  
19 early July 2013. The B&H Bundled Settlement will result in over \$41,000,000 in cash to the  
20 Estate immediately, as well as reserve to Howrey fixed future interests in recoveries from  
21 ongoing contingent fee matters that could potentially result in millions of additional dollars to the  
22 Estate. Broadly speaking, the B&H Bundled Settlement can be divided into four categories, each  
23 of which is analyzed below.  
24

#### 25 **The Contingent Fee Settlements**

26         11. The Estate's most significant recoveries from the B&H Settlement come from  
Howrey's former contingent fee matters that have been and/or will be completed by B&H. Here,

1 the recoveries come in two forms – an up-front cash payment and retained future interests in  
2 ongoing matters. Each is discussed in turn.

3       **12. Up-front cash payment.** Howrey will receive a total up-front cash payment  
4 (including cash from B&H and a wire transfer from an account jointly owned by B&H and  
5 Howrey) of \$38,141,526 from existing contingent fee settlements: \$36,733,215 from SE Milk  
6 and \$1,408,311 from NE Milk. These amounts are broken down as follows.

7  
8       **13. SE Milk/Dean Foods.** On July 5, 2007, one or more of the B&H Former Howrey  
9 Partners, while partners of Howrey, filed two class action antitrust lawsuits, one styled  
10 *Sweetwater Valley Farms, Inc., et al. v. Dean Foods Co., et al.*, C.A. No. 1:07-5 in the United  
11 States District Court for the Middle District of Tennessee (the “Sweetwater Case”) and another  
12 styled *James D. Baisley, et al. v. Dean Foods Co., et al.*, No. 1:07-52 in the United States  
13 District Court for the Middle District of Tennessee (the “Baisley Case”).

14  
15       **14.** On January 10, 2008, the Sweetwater Case and the Baisley Case were transferred  
16 from the Middle District of Tennessee to the United States District Court for the Eastern District  
17 of Tennessee and consolidated with two similar cases, initiating Case No. 2:08-md-01000 in the  
18 United States District Court for the Eastern District of Tennessee (hereinafter “SE Milk”).

19       **15.** In SE Milk, plaintiffs and defendants Southern Marketing Agency, James Baird, and  
20 Gary Hanman entered into a settlement on July 27, 2011, and plaintiffs and defendant Dean  
21 Foods Company entered into a settlement on July 12, 2011, with both receiving court approval  
22 on June 15, 2012 (hereinafter collectively “SE Milk/Dean Foods”). The delay between the  
23 signing of the SE Milk/Dean Foods settlement and the entry of the order approving the  
24 settlement was due in large part to continued, vociferous opposition to plaintiffs’ claims in the  
25 litigation, including a strategy by certain defendants to de-certify the class action. During this  
26 time, B&H vigorously prosecuted the SE Milk matter. The SE Milk/Dean Foods Settlement

1 totaled \$145 million. Plaintiffs sought an award of attorneys' fees equal to one-third of the  
2 settlement, or approximately \$48.33 million. As part of this request for an award, B&H pursued  
3 the recovery of attorneys' fees on behalf of B&H and Howrey. In SE Milk/Dean Foods, the  
4 court awarded attorneys' fees and expenses to plaintiffs' counsel on July 11, 2012, including the  
5 requested approximately \$48.33 million in attorneys' fees.<sup>1</sup> The SE Milk/Dean Foods settlement  
6 and attorneys' fees award were approved, in part, because of the substantial work done by the  
7 B&H Former Howrey Partners.  
8

9 16. In SE Milk, plaintiffs also entered into a settlement with defendant Dairy Farmers of  
10 America, Inc. on January 17, 2013, which settlement was approved on May 17, 2013 (hereinafter  
11 "SE Milk/DFA"). The B&H Former Howrey Partners achieved the SE Milk/DFA settlement on  
12 the eve of trial, after hard-fought litigation against DFA and its able counsel for nearly six years.  
13 The total value of the SE Milk/DFA settlement (including cash and non-cash considerations) was  
14 approximately \$158 million. Plaintiffs sought an award of attorneys' fees equal to one-third of  
15 the settlement, or approximately \$52.66 million in attorneys' fees. Significantly, the B&H  
16 Former Howrey Partners again pursued attorneys' fees for the benefit of both B&H and Howrey.  
17 The District Court approved an award of approximately \$52.66 million in attorneys' fees to  
18 plaintiff's counsel on May 17, 2013. The District Court cited the extraordinary work done by the  
19 B&H Former Howrey Partners as part of the basis to award such a significant amount of  
20 attorneys' fees.  
21  
22

23 17. Because the B&H Former Howrey Partners had, while partners at Howrey, filed and  
24 pursued the SE Milk cases, the Howrey Estate has an interest in any recovery of attorneys' fees  
25

26 <sup>1</sup> The payment of these attorneys' fees was to be made in the same proportion of the structured settlement  
payments themselves. That is, 44.83% of the attorneys' fees (equaling \$21.67 million) was to be paid following the  
settlement's June 2012 effective date, with four equal installment payments of 13.79% of the attorneys' fees  
(approximately \$6.65 million per year) to be made in each June of 2013, 2014, 2015, and 2016 (or approximately  
\$6.65 million per year).

1 and expenses in the matter. Specifically, the Estate's interest relates to the allocation of  
2 attorneys' fees awarded to the various counsel, including Howrey and B&H, which represented  
3 the plaintiffs.

4 18. The B&H Bundled Settlement only discusses the allocation between B&H and  
5 Howrey of attorneys' fees recovered in SE Milk because Howrey has already recovered every  
6 single dollar of expenses that Howrey advanced in the SE Milk litigation. Specifically, pursuant  
7 to the court's award in SE Milk/Dean Foods of expenses recoverable by plaintiff's counsel, the  
8 Trustee negotiated with B&H to reach an agreement regarding the immediate repayment of  
9 Howrey's share of such advanced expenses. This negotiation was significant because B&H did  
10 not have any obligation to pay Howrey these expense funds at that time. Indeed, B&H could  
11 have waited until the conclusion of SE Milk – in hindsight, almost a year later – to pay attorneys'  
12 fees and expenses simultaneously.

13  
14 19. However, the Trustee and his counsel worked closely with B&H to convince the firm  
15 to pay Howrey its share of expenses advanced in SE Milk, which totaled in excess of \$5.9  
16 million. As part of SE Milk/Dean, Howrey received on approximately September 7, 2012, a  
17 wire transfer from B&H of the full \$5.963 million in expenses advanced in SE Milk. Upon  
18 receipt of the expense reimbursement, the Trustee then used the funds to pay down Howrey's  
19 debt to Citibank. Even though the B&H Bundled Settlement only discusses attorneys' fees, it is  
20 still very important to understand that Howrey will have, in *toto*, received over \$42.5 million in  
21 attorneys' fees and expenses from the SE Milk cases – in addition to the millions of dollars in  
22 other monies subject to the B&H Bundled Settlement as detailed below.

23  
24 20. Returning to the topic of attorneys' fees, the amount of attorneys' fees that the Estate  
25 would recover from SE Milk depends on two issues: (a) whether the Transfer Agreement was a  
26 fraudulent transfer that the Trustee could seek to set aside (including any defenses to such a

1 claim) or, if not, what is the proper interpretation of the Transfer Agreement; and (b) whether  
2 Howrey is paid over time in accordance with the SE Milk/Dean settlement structure or in a lump  
3 sum pursuant to a negotiated buy-out of the structured payment stream.

4 21. First, under the Transfer Agreement, Howrey's share of attorneys' fees awarded to  
5 B&H and Howrey is calculated based upon the amount of time B&H has invested in SE Milk  
6 since the signing of the Transfer Agreement. Under the Transfer Agreement, B&H and Howrey  
7 each begin with a 50/50 split of any attorneys' fees recovery, but as B&H invests additional time  
8 in SE Milk, its percentage increases and Howrey's decreases. The Trustee and his counsel refer  
9 to this as the "Melting Ice Cube." Howrey's share of the Melting Ice Cube is calculated as:  
10  $[20/(40 + \text{B\&H Investment in Millions of Dollars}^2)]$ .  
11

12 22. Second, in addition to whether the Transfer Agreement's Melting Ice Cube approach  
13 constituted a fraudulent transfer of Howrey's property interest in the Milk Cases, the Trustee also  
14 has a dispute with B&H over the interpretation of the Transfer Agreement. B&H contends that  
15 the allocation of attorneys' fees on all settlements should not be decided until the end of the case  
16 (the "End of Case Method"). Of course, the End of Case Method benefits B&H because B&H  
17 will receive a higher percentage of attorneys' fees under the Transfer Agreement as the firm  
18 invests more in SE Milk. Conversely, the Trustee contends the allocation of attorneys' fees  
19 should be determined on a settlement-by-settlement basis, based upon the amount B&H had  
20 invested in SE Milk as of the date of the settlement (the "Snapshot Method"). The Snapshot  
21 Method results in a greater recovery to Howrey because it ties B&H's percentage to the amount  
22 invested at the time of settlement and does not permit B&H to dilute Howrey's investment by  
23 including fees invested after the date of settlement.  
24  
25  
26

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<sup>2</sup> The Transfer Agreement defines B&H Investment as "B&H's actual investment in the Milk Cases, measured on the basis of work product performed at standard rates from the inception of B&H's involvement in such Milk Case."



1           23. Of the approximately \$100 million in total attorneys' fees awarded in both SE  
2 Milk/Dean and SE Milk/DFA, both B&H and the Trustee's counsel estimated that \$92 million  
3 would be allocated to B&H and Howrey to allocate amongst themselves. The remainder will go  
4 to pay co-counsel who also prosecuted the Milk Cases on behalf of their own clients or as local  
5 counsel to B&H and Howrey. A significant non-monetary benefit to the B&H Bundled  
6 Settlement is that Howrey gets its money now, directly from B&H, and regardless of whether the  
7 allocation of attorneys' fees between the various plaintiffs' counsel results in any fee disputes, all  
8 of which could take years to resolve. The B&H Bundled Settlement therefore provides the  
9 Estate with finality and certainty.

11           24. Based upon its contention that the Transfer Agreement is not a fraudulent transfer and  
12 that the End of the Case Method is the correct interpretation of the Transfer Agreement, B&H  
13 contends that Howrey's share of the attorneys' fees recovery in SE Milk is 36.53%. B&H  
14 reaches this conclusion by adding the B&H Investment of \$14,739,630 to the formula for  
15 calculating Howrey's interest under the Transfer Agreement. Howrey's share equals  $[20/(40 +$   
16  $14.739630)]$ , or 36.53%. Applying this percentage to the \$92 million that B&H and Howrey  
17 collectively expect to receive in attorneys' fees from SE Milk, B&H claims Howrey is entitled to  
18 receive approximately \$33,379,600 over the life of the SE Milk settlements, which would be  
19 approximately \$26,577,462 up-front and \$6,082,138 divided into three equal installment  
20 payments during 2014, 2015, and 2016.

23           25. Under the B&H Bundled Settlement, Howrey receives immediate cash payments  
24 under SE Milk equal to \$36,733,215, which is approximately \$3.35 million higher than the  
25 amount B&H would have allocated under the Transfer Agreement because: (a) the Trustee and  
26 his counsel convinced B&H that Howrey would more than likely prevail that the Transfer  
Agreement mandates the Snapshot Method; and (b) B&H paid a premium over the Transfer

1 Agreement amount to avoid the risk, delay, and expense related to whether the Transfer  
2 Agreement would be found to be a fraudulent transfer.

3         26. The Trustee allocates Howrey's recovery under the Milk Cases as follows. For SE  
4 Milk/Dean Foods, under B&H's End of the Case interpretation of the Transfer Agreement,  
5 Howrey would receive a maximum \$16,438,500 over the pay-out term of the SE Milk/Dean  
6 Foods settlement. As part of the B&H Bundled Settlement, however, the Trustee was able to  
7 negotiate a lump-sum payment of \$19,792,115.

9         27. In addition, as previously stated, the SE Milk/Dean Foods settlement would be paid  
10 out over time, with \$65 million up front and then \$20 million in annual payments over the next  
11 four years. Attorneys' fees of one-third of the settlement would be paid from each tranche.  
12 Under B&H's interpretation of the Transfer Agreement, Howrey would receive 36.53% of the  
13 attorneys' fees available to B&H and Howrey in 2013 (approximately \$9,636,362), and 36.53%  
14 or less of payments in 2014, 2015, and 2016 (approximately \$2,267,379 each year, for a total of  
15 \$6,802,138).

17         28. As part of the B&H Bundled Settlement, however, the Trustee and his counsel  
18 negotiated the Estate's share of the total SE Milk/Dean Foods attorneys' fees pay-out to be  
19 \$21,373,500, or \$4,935,000 more than what it would have received under B&H's interpretation  
20 of the Transfer Agreement. Because much of this amount could be paid over a period of years  
21 under the structured pay-out terms of the SE Milk/Dean Foods settlement, the Trustee then  
22 proceeded to negotiate with B&H to monetize Howrey's entitlement to such future payments  
23 under SE Milk/Dean Foods. The Trustee proposed, and B&H accepted, that B&H agree to  
24 purchase Howrey's entitlement to future income interests in the structured pay-out of the SE  
25 Milk/Dean Foods settlement at a net present value equal to an approximate annual return of  
26 6.5%. Based on this proposal, B&H agreed to purchase Howrey's future interest in SE

1 Milk/Dean Foods (which, under the B&H Bundled Settlement, totals approximately \$8,842,217)  
2 for \$7,260,832. This results in an up front, lump-sum, cash payment to the Estate of  
3 \$19,792,115 on SE Milk/Dean Foods (which is equal to the up-front lump sum payment of  
4 approximately \$12.5 million and the \$7.2 million purchase of the structured pay-out).

5  
6 29. Additionally, with respect to SE Milk/DFA, because the Trustee and his counsel  
7 determined that there is little difference between the application of the Snapshot and End of Case  
8 Methods to the SE Milk/DFA settlement, the Trustee agreed to accept \$17,216,100, which is  
9 approximately the same as what B&H contends Howrey would ultimately be entitled to under  
10 the Transfer Agreement. Thus, the total up front, lump sum cash payment to the Estate pursuant  
11 to the B&H Bundled Settlement is \$37,008,215 (\$19,792,115 from SE Milk/Dean Foods plus  
12 \$17,216,100 from SE Milk/DFA).

13  
14 30. NE Milk/Dean. On January 21, 2010, one or more of the B&H Former Howrey  
15 Partners, while partners at Howrey, joined a class action antitrust lawsuit styled *Alice H. Allen, et*  
16 *al. v. Dairy Farmers of America, Inc.*, et al. in the United States District Court for the District of  
17 Vermont (hereinafter "NE Milk"). The two primary defendants in NE Milk are Dean Foods  
18 Company ("Dean Foods") and Dairy Farmers of America, Inc. ("DFA").

19  
20 31. In NE Milk, plaintiffs and Dean Foods entered into a settlement on December 7,  
21 2010, that was approved by the District Court on August 3, 2011 (hereinafter "NE Milk/Dean  
22 Foods"). In NE Milk/Dean Foods, the District Court approved an award of attorneys' fees and  
23 expenses to plaintiffs' counsel on August 3, 2011. The NE Milk case against DFA is ongoing  
24 (hereinafter "NE Milk/DFA").

25  
26 32. In NE Milk/Dean Foods, Howrey and B&H were jointly awarded \$1,435,986 in fees  
and approximately \$810,000 in expenses. The \$810,000 in expenses was approximately 74.4%  
of what Howrey and B&H sought. As is seen throughout, B&H's position is that the NE

1 Milk/Dean Foods payment must be allocated according to the Transfer Agreement, which B&H  
2 strongly contends is not a fraudulent transfer. If the Transfer Agreement were enforced, Howrey  
3 would receive \$1,266,621, which is equal to 60% of the attorneys' fees awarded plus Howrey's  
4 pro rata share of expenses awarded.

5 33. Here, the Trustee settled NE Milk/Dean Foods for \$1,408,311, which reflects a  
6 payment of \$141,960 over the Transfer Agreement. Of the NE Milk/Dean Foods attorneys' fees  
7 and expenses award, B&H will receive approximately \$837,675, over two-thirds of which is  
8 attributable to expenses that B&H advanced after Howrey's dissolution. In sum, because of this  
9 settlement, Howrey will receive over 70% of the attorneys' fees awarded to Howrey and B&H in  
10 NE Milk/Dean Foods.

11 34. As discussed below, Howrey also retains a significant future contingent fee interest in  
12 NE Milk/DFA.

13 35. **Retained Future Interests.** In addition to the cash payments discussed above, the  
14 Trustee has also negotiated a fixed interest in various potential recoveries for the Estate in  
15 Howrey's former contingency matters that are ongoing at B&H and discussed below. In NE  
16 Milk/DFA, for example, because ongoing litigation requires B&H to make substantial  
17 investment in time and out-of-pocket expenses and take all additional risk (and because Howrey  
18 had invested far less in NE Milk than SE Milk), Howrey and B&H have agreed that any future  
19 attorneys' fees recovered in that matter will be split 75% to Baker and 25% to Howrey, with any  
20 expenses recovered split according to what each firm has incurred.

21 36. Outside of the Milk Cases, B&H is also continuing to prosecute a class action  
22 antitrust case known as Online DVD. On January 2, 2009, one or more of the B&H Former  
23 Howrey Partners, while partners at Howrey, filed a class action antitrust lawsuit styled *Andrea*

1 *Resnick, et al. v. Walmart.com USA LLC, et al.*, C.A. No. 4:09-cv-00002, in the United States  
2 District Court for the Northern District of California (the “Walmart Case”).

3 37. On April 13, 2009, the Walmart Case was consolidated with eleven similar cases by  
4 the United States Panel on Multidistrict Litigation, initiating Case No. 4:09-md-02029 in the  
5 United States District Court for the Northern District of California (hereinafter “Online DVD”).

6 38. Two of the defendants in Online DVD are Walmart.com USA LLC (“Walmart”) and  
7 Netflix, Inc. (“Netflix”). In Online DVD, plaintiffs and Walmart entered into a settlement on  
8 July 15, 2011, that was approved by the court on March 29, 2012 (hereinafter “Online  
9 DVD/Walmart”). Certain parties have now appealed the order approving the Online  
10 DVD/Walmart settlement to the United States Court of Appeals for the Ninth Circuit (the “Ninth  
11 Circuit”), and the appeals are styled: *Theodore H. Frank, et al. v. Netflix, Inc., et al.*, No. 12-  
12 15705; *Jon Zimmerman, et al. v. Netflix, Inc., et al.*, No. 12-15889, *Andrea Resnick, et al. v.*  
13 *Edmund Bandas, et al.*, No. 12-15957; *Andrea Resnick, et al. v. Maria Cope, et al.*, No. 12-  
14 15996; *Andrea Resnick, et al. v. John Sullivan, et al.*, No. 12-16010; and *Andrea Resnick, et al.*  
15 *v. Tracey Cox, et al.*, No. 12-16038. The Ninth Circuit consolidated the Online DVD/Walmart  
16 appeals under Case No. 12-15705 pursuant to an order entered on May 8, 2012.

17 39. In Online DVD, defendant Netflix was granted final summary judgment at the trial  
18 court, and plaintiffs have appealed to the Ninth Circuit, in a pending appeal styled *Andrea*  
19 *Resnick, et al. v. Netflix, Inc.*, Case No. 11-18034 (hereinafter “Online DVD/Netflix”).

20 40. Because the outcome of both Online DVD/Walmart and Online DVD/Netflix is  
21 uncertain, the B&H Bundled Settlement contains a fixed formula for calculating what Howrey  
22 would receive in the event the Online DVD/Walmart settlement is upheld or the Online  
23 DVD/Netflix summary judgment in favor of the defendant is overturned.

1 41. If the Online DVD/Walmart matter results in any payment of attorneys' fees,  
2 reimbursable expenses, or costs, B&H will pursue – on behalf of B&H and Howrey – the  
3 amounts owed to the firms. If B&H and Howrey recover fees, the fees will be allocated on a  
4 *quantum meruit* basis as of the time B&H receives the Online DVD/Walmart payment, with the  
5 *quantum meruit* calculation based upon the time value of hours each firm has billed in the Online  
6 DVD matters at each firm's standard rates. If B&H and Howrey recover expenses as part of the  
7 Online DVD/Walmart matter, Howrey and B&H shall allocate any expense award based on the  
8 actual dollars that each has spent on expenses in the Online DVD matters. In exchange for  
9 B&H's pursuit of fees and expenses in Online DVD/Walmart, Howrey has agreed to pay B&H  
10 the first \$25,000 of any amounts Howrey recovers on Online DVD/Walmart as compensation for  
11 the firm's fees and expenses in pursuing the award.  
12

13 42. In Online DVD/Netflix, the allocation between B&H and Howrey is connected with  
14 the completion of any Online DVD/Netflix appeal. If the appeal overturns the summary  
15 judgment, and some amount of attorneys' fees or expenses is awarded within three (3) months of  
16 the date the appeal is decided, then B&H and Howrey shall allocate any such attorneys' fees and  
17 expenses award on the *quantum meruit* basis summarized above. If the Online DVD/Netflix  
18 matter resumes, however, and takes more than three months to result in the recovery of  
19 attorneys' fees and expenses to Howrey or B&H, then Howrey shall receive 30% of any future  
20 attorneys' fees award in the Online DVD/Netflix matter, with reimbursable expenses allocated  
21 based upon the actual dollars that each firm has spent.  
22

23 43. The Trustee believes both future interest allocations are reasonable. In Online  
24 DVD/Walmart, the Trustee has secured the *quantum meruit* allocation that is tied to each firm's  
25 actual investment in the case. In Online DVD/Netflix, the Trustee has fixed Howrey's  
26 percentage at a level that puts the vast majority of the risk on B&H – if the Online DVD/Netflix

1 litigation resumes and take years to complete, B&H could very well be entitled to more than  
2 70% of the recovery in that matter.

3 **The Unfinished Business Settlement**

4 44. Pursuant to informal discovery conducted under Fed. R. Evid. 408, the Trustee and  
5 his counsel confirmed (via the receipt of information and documents) that B&H has collected  
6 \$15,124,984 on Howrey's unfinished business. After confidential questioning with B&H, the  
7 Trustee and his counsel determined that B&H's profit margin for the attorneys working on this  
8 hourly unfinished business was approximately 19% (excluding their contingent fee work),  
9 yielding damages – before deductions for reasonable partner compensation – of \$2,282,248.  
10

11 45. The Trustee reached an agreement with B&H to settle Howrey's hourly unfinished  
12 business claims against B&H for \$2,303,531, which was calculated and determined to be 80.2%  
13 of B&H's profit and 15.3% of its gross revenue. The Trustee has stated in other public filings  
14 that his goal is to settle hourly unfinished business claims for 50% of profit or 15% of gross  
15 revenue, whichever is higher. The settlement the Trustee has reached here with B&H greatly  
16 exceeds the recovery goal for percentage of profit, and exceeds the revenue recovery goal as  
17 well.  
18

19 46. B&H does have a few ongoing hourly matters that may constitute Howrey's  
20 unfinished business. However, the Trustee has released claims related to those matters because:  
21 (a) there was a fact dispute regarding whether the ongoing matters were Howrey's unfinished  
22 business; (b) collecting the high percentage of profit on the current revenue and the significant  
23 contingent fee recoveries subsumed any benefit of continued litigation over future revenue on  
24 minor unfinished business matters and (c) the amount of projected revenue was less than 10% of  
25 the amount collected to date, and given the uncertainty that the revenue would ever be collected,  
26 amounted to a very small potential recovery.

1 **The Partner Clawback Settlement**

2 47. Of the 11 B&H Former Howrey Partners, eight are subject to some form of clawback  
3 claim by the estate. (The two fixed partners and one Level I partner are not being pursued by the  
4 estate for any clawback claim.) These eight partners received a total of \$4,065,840 in  
5 distributions or return of capital from the second quarter of 2010 through the first quarter of  
6 2011, the time period during which the Trustee contends Howrey was insolvent, unable to pay its  
7 debts as they came due, or inadequately capitalized.  
8

9 48. Of these eight partners, all or nearly all of them were involved in the prosecution of  
10 the Milk Cases at both Howrey and B&H. Because these attorneys made the recovery of  
11 millions of dollars in attorneys' fees and expenses in the Milk Cases possible, the B&H Former  
12 Howrey Partners argued strenuously that their clawback liability to the Estate should be \$0. This  
13 was a major sticking point in the negotiations for months, if not years. The B&H Former  
14 Howrey Partners believe, and were prepared to litigate (with B&H's support), that the partners  
15 provided more than reasonably equivalent value to Howrey for distributions received because it  
16 was their work that resulted in such a significant contingent fee recovery to the firm.  
17

18 49. Notwithstanding these arguments regarding the admittedly tremendous value the  
19 B&H Former Howrey Partners provided to the Estate, the Trustee and his counsel were able to  
20 negotiate that the B&H Former Howrey Partners will pay \$275,000 for release of the estate's  
21 clawback claims against them. This amounts to approximately 7% of the total amount received  
22 during the insolvency period, and an average of \$34,375 per partner.  
23

24 50. Moreover, the settlement with the B&H Former Howrey Partners reflects that  
25 analyzing whether the partners provided reasonably equivalent value for their distributions is  
26 complicated by the fact that many of (and some of the highest paid) partners worked on the  
contingent fee cases that have brought such a significant recovery to Howrey. While there is no



1 comparable situation in any of the other law firm bankruptcies where certain partners were  
2 primarily, if not exclusively, responsible for generating tens of millions of dollars in recoveries  
3 to the Estate, this settlement nevertheless is within the settlement range accepted in certain of the  
4 other global law firm bankruptcies.

#### 5 **The Section 549 Settlement**

6  
7 51. B&H or one or more of the B&H Former Howrey Partners also received funds that  
8 may be recovered pursuant to Section 549 of the Bankruptcy Code. Specifically, B&H and Mr.  
9 Commins received a total of \$92,204 in amounts paid to Mr. Commins or to B&H for Mr.  
10 Commins' service on Howrey's dissolution committee.

11 52. Similar to the partner clawback negotiations, Mr. Commins argued that neither he nor  
12 B&H should pay the Estate on its Section 549 claims in light of the tremendous value provided  
13 to the Estate in connection with the Milk Cases. Notwithstanding his arguments, the Trustee has  
14 settled this claim for \$20,000. The Trustee believes that this settlement of approximately 21.7%  
15 of this comparatively very small Section 549 claim, in light of total amount recovered in the  
16 B&H Bundled Settlement, is reasonable.

#### 17 **TERMS OF PROPOSED B&H BUNDLED SETTLEMENT**

18  
19 53. The material terms of B&H Bundled Settlement are set forth in **Exhibits A** (the  
20 Settlement Agreement) and **Exhibit B** (Declaration of Allan B. Diamond), but are summarized  
21 here as follows:  
22

23 a. Howrey will receive cash payments or transfers totaling over \$41,000,000  
24 within days of the Effective Date.

25 b. Howrey will retain valuable interests in future contingent fee recoveries on  
26 matters that the B&H Former Howrey Partners took to B&H.

1 c. The Parties agree to mutual general releases, as described by paragraphs 7, 8,  
2 and 9 of the B&H Bundled Settlement.

3 **BASIS FOR RELIEF**

4 54. Bankruptcy Rule 9019(a) provides that “[o]n motion by the trustee and after notice  
5 and a hearing, the court may approve a compromise or settlement.”

6 55. “The bankruptcy court has ‘great latitude’ in approving compromise agreements.”  
7 *Woodson v. Fireman’s Insurance, Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988).  
8 However, the compromise must be “fair and equitable” and “in the best interest of the estate.”  
9 *Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986), *cert. denied sub*  
10 *nom. Martin v. Robinson*, 479 U.S. 854 (1986).

11 56. To evaluate a compromise, a bankruptcy court considers “(a) [t]he probability of  
12 success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection;  
13 (c) the complexity of the litigation involved, and the expense, inconvenience and delay  
14 necessarily attending it; [and] (d) the paramount interest of the creditors and a proper deference  
15 to their reasonable views in the premises.” *In re A & C Properties*, 784 F.3d at 1381.

16 57. Although the Trustee, as the proponent of the settlement, bears the burden of  
17 persuasion (*see id.*), “a court generally gives deference to a trustee’s business judgment in  
18 deciding whether to settle a matter,” *In re Mickey Thompson, Entertainment Group, Inc.*, 292  
19 B.R. 415, 420 (B.A.P. 9th Cir. 2003).

20 58. Here, as supported by the Trustee’s accompanying declaration attached hereto as  
21 **Exhibit B**, the factors weigh in favor of settlement.

22 59. **The Probability of Success in the Litigation, its Complexity, and the Expense,**  
23 **Inconvenience, and Delay of Attending to the Litigation.** In the B&H Bundled Settlement,  
24 the first two *A&C Properties* factors are closely related, with both supporting the settlement. As

1 an initial matter, any litigation against B&H will be complex, expensive, inconvenient, and  
2 lengthy.

3 60. Specifically, any litigation against B&H over the validity of the Transfer Agreement  
4 would require an extensive, and expensive, analysis of what reasonably equivalent value Howrey  
5 received for transferring some its contingent fee interest in the Milk Cases to B&H. The Trustee  
6 and his counsel discussed and researched this issue extensively, and no clear-cut law was found.  
7 B&H's primary value arguments would be based upon indirect benefits given to Howrey, and  
8 valuing those benefits would be difficult, subject to expert analysis, and expensive. The Trustee  
9 would first have to value the contingent interest transferred, then determine which indirect  
10 benefits B&H provided to Howrey in exchange for the transferred contingent interests, and then  
11 value the indirect benefits to determine if B&H gave reasonably equivalent value.  
12

13 61. This level of complexity would make any litigation against B&H lengthy, time-  
14 consuming, and expensive. Moreover, B&H represented – and the Trustee believes their  
15 representation – that the firm would litigate to conclusion the validity of the Transfer Agreement.  
16 This would delay Howrey's receipt of any of the contingent fee funds at issue (possibly by years,  
17 including appeals), especially at a time when such funds are needed to pay down secured debt  
18 and fund the estate's ongoing litigation against other targets.  
19

20 62. Notwithstanding these risks, the Trustee has consummated a settlement that obtains  
21 for Howrey far more than it would have received under the Transfer Agreement. In net dollars,  
22 Howrey will receive over \$3.53 million more than it would receive under the Transfer  
23 Agreement, and it will receive its money immediately. Moreover, no matter how much  
24 additional time that B&H invests in NE Milk/DFA, the Trustee has fixed a future interest that  
25 may entitle the Estate to a substantial recovery (possibly millions of dollars) if the matter is ever  
26 reduced to settlement or judgment.

1           63. The other portions of the B&H Bundled Settlement, while having a higher probability  
2 of success, are nevertheless uncertain because each may involve contentious, protracted litigation  
3 whose results may only be resolved after exhaustive appeals. The unfinished business settlement  
4 reflects a high probability of success, and the partner clawback and Section 549 settlements  
5 reflect a substantial likelihood of success, even in light of the value defenses asserted by B&H  
6 and the B&H Former Howrey Partners (but uncertainty always exists involving protracted  
7 litigation and appeals.)  
8

9           **64. The Difficulty of Collection.** Here, the Trustee believes this factor best applies to  
10 Howrey's future interest in contingent fee cases. While a money judgment might ultimately be  
11 recoverable from B&H, the difficulty in collecting lies in the difficulty of continuing to  
12 prosecute NE Milk/DFA and Online DVD. The vigorous prosecution of these claims is in the  
13 best interests of the estate.  
14

15           65. With respect to NE Milk/DFA, for example, B&H will have to litigate this matter  
16 against a well-funded defendant, with able counsel challenging every aspect of the litigation.  
17 B&H will invest significant time and out-of-pocket expense in pursuing NE Milk/DFA and, if  
18 any ultimate recover results in an attorneys' fee award to plaintiffs' counsel, Howrey will be  
19 entitled to share in this recovery of attorneys' fees based on the terms fixed by the B&H Bundled  
20 Settlement.  
21

22           66. Fixing the amount Howrey is to be paid in the event of any recovery avoids the  
23 expense of haggling over the amounts payable to the firm. It also incentivizes B&H to recover  
24 all it can for both B&H and Howrey, which benefits the Estate's creditors.

25           **67. The Paramount Interest of Creditors and Deference to their Views.** This factor  
26 overwhelmingly supports the B&H Bundled Settlement. Given the importance of these  
contingent matters to Howrey's Estate, the Trustee has included Citibank and the Creditors

Committee in every stage of discovery, proposals, negotiations, and settlement. The Trustee has had the support of Citibank and the Creditors Committee at every stage, and both are unequivocally in favor of the B&H Bundled Settlement. And, as demonstrated with the Citibank Settlement motion filed contemporaneously herewith, the B&H Bundled Settlement will permit me to pay down a significant portion of Howrey's secured debt and fund its ongoing administrative expenses, which brings the constituencies closer to a consensual chapter 11 plan (which the Trustee hopes to file as soon as practicable), with the goal of payments to priority, administrative, and general unsecured creditors.

### **CONCLUSION**

For the foregoing reasons, the Trustee respectfully requests that the Court grant the Motion and enter and order approving the B&H Bundled Settlement with B&H and the B&H Former Howrey Partners as described above.

Dated: August 16, 2013

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1 **NOTICE OF SERVICE**

2   X   (CM/ECF) The document was electronically served on the parties to this action via the  
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20        (FACSIMILE) That I served a true and correct copy of the above-referenced document via  
21 facsimile, to the facsimile numbers indicated, to those people listed on the attached service list,  
22 on the date above written.

23 /s/ Andrew B. Ryan

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1 VIA CM/ECF:

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